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Supreme Court of the United States

October Term, 1941

NEBO OIL COMPANY, a Trust, by W. H. Clement, Trustee,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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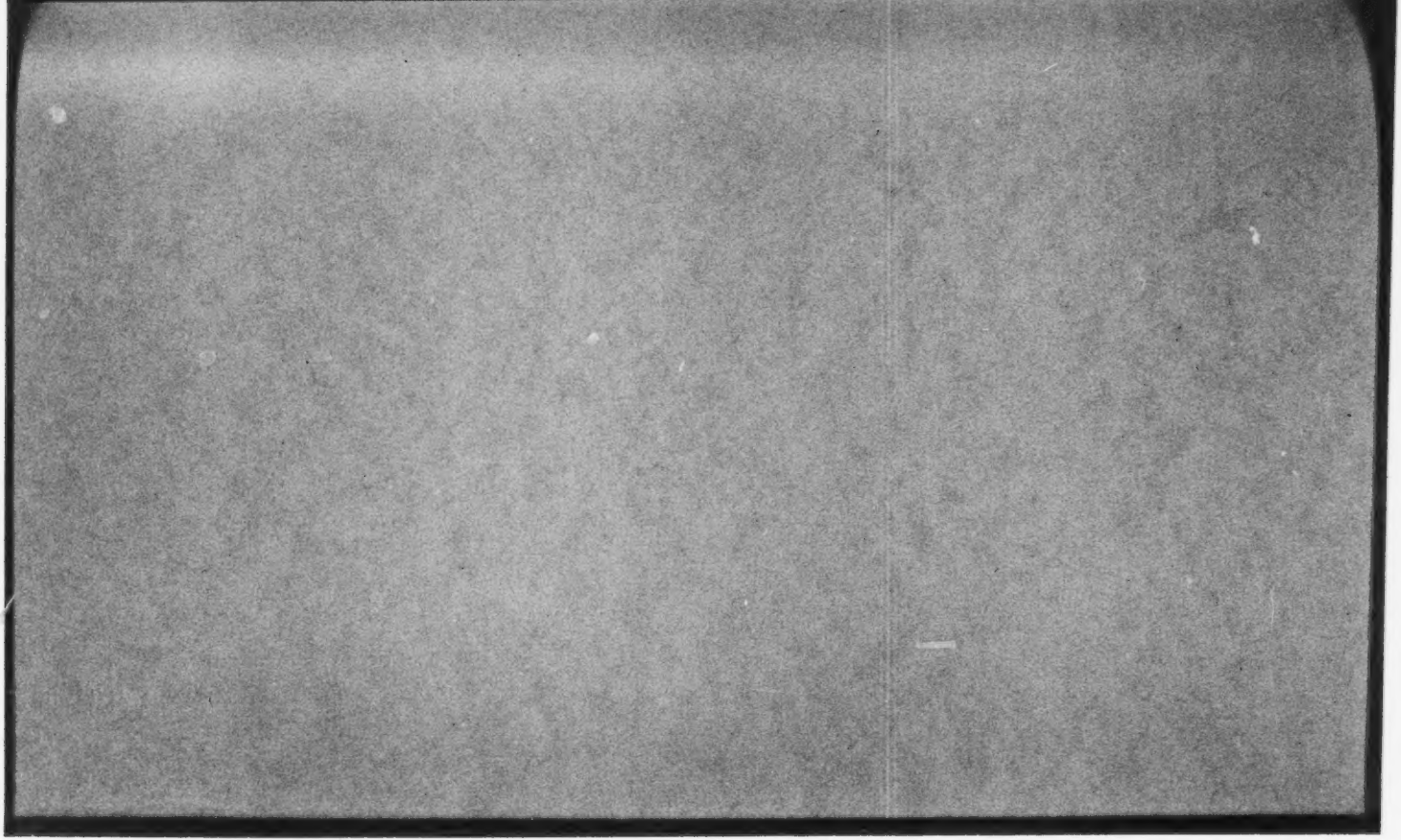

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Supreme Court of the United States

OCTOBER TERM, 1941

No. ---------

NEBO OIL COMPANY, a Trust, by W. H. Clement, Trustee,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The Petitioner, Nebo Oil Company, a Trust, by W. H. Clement, Trustee, respectfully petitions this Honorable Court for a Writ of Certiorari in the above entitled cause, to the United States Circuit Court of Appeals for the Tenth Circuit, and respectfully shows to this Honorable Court as follows:

Short Statement of the Matters Involved

The Petitioner made a fiduciary income tax return of its income for the years 1934, 1935, 1936, and 1937. The Commissioner of Internal Revenue served a notice of deficiency, the basis thereof being that Petitioner was properly classified as an association taxable as a corporation, and,

therefore, should have filed a return of its income for such years upon a corporate form. Petitioner then filed a Petition for review by the United States Board of Tax Appeals. At the trial before the Board of Tax Appeals, evidence was presented by both Petitioner and the Government. The Board found in Petitioner's favor and held that under the facts Petitioner was a trust for the purposes of income taxation and not an association taxable as a corporation. (R-13)

The Respondent, Guy T. Helvering, Commissioner of Internal Revenue, filed a Petition for review of the Board's decision with the United States Circuit Court of Appeals for the Tenth Circuit (R-21). The Circuit Court reversed the ruling of the United States Board of Tax Appeals, held Petitioner properly classified by collector as an association, and remanded the cause for further proceedings (R-77). The opinion of the Circuit Court is officially reported in 126 Fed. (2d) 148. The language of the Circuit Court indicating its reason for such reversal is found R-77.

> "Hence, we conclude the resemblance to a corporate organization was sufficient to warrant the Commissioner in treating the trust as an association. See Morrissey v. Commissioner, supra; Helvering v. Coleman-Gilbert Associates, 296 U. S. 369, 371-373, 56 S. Ct. 285, 80 L. Ed. 278; and Commissioner v. Fortney Oil Co., 6 Cir., 125 Fed. (2d) 995, (decided February 7, 1942)."

The evidence R-25, et seq., indicated that Petitioner resembled a trust in some respects, a partnership in others, and in still others a corporation. The Board held that Petitioner was predominately akin to a trust. Petitioner now contends that the Circuit Court exceeded its powers of re-

view upon the appeal in reversing the Board's determination of fact, and that the judgment of the Circuit Court was erroneous in classifying Petitioner as an association, as Petitioner more nearly resembles a partnership, if not a trust.

Reasons Relied on for the Allowance of the Writ

I.

Petitioner says that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court for that it exceeded the limitations upon its jurisdiction on review from the Board of Tax Appeals, as fixed by this Court, *Helvering* v. *National Grocery Company*, 304 U. S. 282, 58 S. Ct. 932. And for that the Circuit Court was prohibited by Section 1 under Subsection c of Section 1141, Title 26, *U.S.C.A.*, from reviewing a determination of fact by the said Board of Tax Appeals. And for that the Circuit Court could not determine that Petitioner is an association taxable as a corporation when the facts indicate that Petitioner more nearly resembles a partnership, if not a trust. *Lewis and Company* v. *Commissioner*, 301 U. S. 385, 57 S. Ct. 799.

II.

Petitioner says that the decision of the Circuit Court of Appeals is in apparent conflict with the decision of the 5th Circuit in *Del Mar Addition* v. *Commissioner*, 113 Fed. (2d) 410, and the decision of the 5th Circuit in the case of *Commissioner of Internal Revenue* v. *Horseshoe Lease Syndicate*, 110 Fed. (2d) 748, certiorari denied 311 U. S. 666, 61 S. Ct. 24, for that in this case the Circuit Court disregarded the finding by the Board of Tax Appeals of the

taxable status of Petitioner and made its own determination of Petitioner's taxable status in conflict with the above mentioned decisions which held that finding of the Board in determinations of this classification must be upheld if there is substantial evidence to support it, even though conflicting inferences might be drawn by reasonable men from the undisputed facts.

III.

Petitioner says that the Circuit Court of Appeals decided a Federal Question in a way probably in conflict with the applicable decisions of the 6th Circuit Court in the case of *Commissioner of Internal Revenue* v. *Gibbs-Preyer Trusts Nos. 1 & 2*, 117 Fed. (2d) 619, and with the decision of the 5th Circuit in the case of *Commissioner of Internal Revenue* v. *Rector & Davidson*, 111 Fed. (2d) 332, certiorari denied 311 U. S. 672, 61 S. Ct. 33, for that the courts in their decisions say that an entity with the characteristics of Petitioner is more properly taxable as a partnership, if not as a trust, and the court in this case determined Petitioner to be an association.

Prayer

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and send to this Court for its review and determination, a full and complete transcript of the record in all proceedings in the case entitled and numbered on its docket Commissioner of Internal Revenue, Petitioner, v. Nebo Oil Company, Trust, Respondent, No. 2320, and that

the judgment of said court in said cause may be reversed by this Honorable Court, and that your Petitioner may have such further relief in the premises as to this Honorable Court may seem just.

GEORGE M. GREEN,
T. MURRAY ROBINSON,

Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1941

No. _____

NEBO OIL COMPANY, a Trust, by W. H. Clement, Trustee,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 126 Fed. (2d) 148.

Jurisdiction

1. The date of the decision to be reviewed is February 18, 1942, rehearing denied March 24, 1942.

2. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by Act of February 13, 1925, 43 Stat. 938; Sec. 347 of Title 28, *U.S.C.A.*

Statement of the Case

The various proceedings and decisions have been given under the brief statement in the Petition for the Writ, to which this Brief is attached, and will not be here repeated. The statement of the facts is found R-25, et seq. The finding of facts by the Board is found R-14, et seq. The finding of facts as revised by the Circuit Court is found R-72, et seq. The admitted facts may be briefly summarized as follows:

In 1928 there existed partnerships composed of Replogle and Johnston, Replogle and Clement, Clement and Johnston, and Replogle, Clement and Johnston, all these parties maintaining joint offices (R-44). In that year these individuals acquired an oil and gas lease in the Oklahoma City field known as the Nebo-Little lease, each contributing an equal share to the cost. Title was vested in W. H. Clement, who, by operation of law, held the share of D. Replogle and William G. Johnston in trust. When acquired, the lease was in undeveloped territory, but gradual extension of the development produced offset wells by the year 1932. After acquisition Clement and his associates, without avail, attempted to dispose of the lease. In 1932 the lessors demanded development and threatened cancellation of the lease if drilling operations were not immediately commenced. At this time Clement and his associates entered into a drilling contract to drill a well on the lease, and while this well was waiting to be completed the trust declaration dated December 12, 1932, was entered into (R-27). The trust instrument provided that the trust should be known as the Nebo Oil Company. Clement testified (R-27):

"We anticipated the well would produce. In filing that trust instrument, the parties had in mind simply to make a record showing of their ownership. We had previously held in our own name the same title in trust for the parties."

The trust instrument vested broad and discretionary powers in the trustee to hold, manage, operate, and deal with the trust property. It limited the liability of the parties and provided for a transfer of an entire interest. No certificates were issued; the trust had no officers, no minute book or seal; it held no regular meetings; it maintained no separate offices; it was not listed in any telephone directory; it had no separate employees other than those on the leasehold, and all of its business was administered in the office of Replogle, Johnston and Clement (R-28). These partners subsequently extended advances and guarantees to the trust amounting to the aggregate of $90,000.00. See exhibits R-65, 67, 69, and statement of the court R-75. On November 10, 1933, there was executed a limitation on the powers of the trustee providing that no expenditures should be made except on the trust property and providing for disbursement, when received, of all surplus funds. On February 14, 1935, the trust was further amended providing it should terminate three years from that date, but that it might be extended by agreement; that the trustee should make quarterly disbursements and should have no power to drill additional wells. On October 7, 1933, prior to the last mentioned amendments, an oil and gas lease known as the "Odebracht Lease" previously acquired by the three individuals, title to which was held by Clement, was declared by Clement to be a trust property. The first well was

completed December 15, 1932, and in the following 18 months three additional wells were drilled. Other than the two leases above named, the trust owned no other properties, and all the funds received by it were either applied to the cost of further development or were disbursed to the partner beneficiaries. There have been no transfers of interest nor any attempt to sell beneficial interests in the trust. The Board of Tax Appeals, from the foregoing facts, held the Petitioner a trust. The Circuit Court held that the foregoing facts justified the Commissioner in determining that Petitioner was an association taxable as a corporation and reversed the Board of Tax Appeals.

Specification of Errors

Petitioner says that the Circuit Court erred in the following particulars in its decision in this case:

1. In considering the factual determination of whether Petitioner more nearly resembled a trust or more nearly resembled an association, as this had been determined by the Board of Tax Appeals.

2. In holding that Petitioner was an association taxable as a corporation, when in fact Petitioner more nearly resembles a partnership, if not a trust.

Summary of Argument

The Petitioner relies on the following propositions in support of its Petition:

1. The Circuit Court is without power to review questions of fact determined by the Board of Tax Appeals.

2. That the facts do not support the Circuit Court in its finding that the Petitioner was an association.

Argument

I.

The Circuit Court is without power to review questions of fact determined by the Board of Tax Appeals.

Section 801, Revenue Act of 1934, and Section 1001, Revenue Act of 1936, define the terms "corporation" and "partnership" as follows:

> "(2) The term 'corporation' includes associations, joint-stock companies, and insurance companies.
>
> "(3) The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

Sections 161, Revenue Acts of 1934 and 1936, provide that the trust income distributable to beneficiaries shall be taxable to the beneficiaries and not to the trust or fiduciary.

Sections 181, Revenue Acts of 1934 and 1936, provide that the income of a partnership is taxable to the individuals.

A tax upon corporation income is provided by Sections 13 of the Revenue Acts of 1934 and 1936.

The Revenue Act does not make any provision for the taxation of an entity, which has the characteristics of both an association and a trust. The determination of the proper classification of such an entity which has some of the characteristics of both, but not all of the characteristics of either, is made by determining which it more closely re-

sembles. That is by determining whether it more closely resembles a trust, for taxation purposes, as defined by the regulations and the decisions of the court, or an association, for taxation purposes, as defined by the regulations and the decisions of the court. Whether this hybrid is more nearly fish or more nearly fowl has been held to be a determination of fact and each case must rest upon its own facts.

The most recent decisions of this Court determining on the facts presented in each case, the taxable status as trusts or associations, of certain taxable entities there involved, are as follows:

Swanson v. *Commissioner of Internal Revenue*, 296 U. S. 362, 56 S. Ct. 283;

Helvering v. *Coleman-Gilbert Associates*, 296 U. S. 369, 56 S. Ct. 285;

Helvering v. *Combs*, 296 U. S. 365, 56 S. Ct. 287;

Morrissey v. *Commissioner of Internal Revenue*, 296 U. S. 344, 56 S. Ct. 289;

A. A. Lewis & Co. v. *Commissioner of Internal Revenue*, 301 U. S 385, 57 S. Ct. 799.

In *Commissioner* v. *Horseshoe Lease Syndicate*, 110 Fed. (2d) 748, certiorari denied 311 U. S. 666, 61 S. Ct. 24, the court said:

> "Upon petition to review a decision of the Board of Tax Appeals, we must decide whether or not the respondent was, during the tax year 1932, an association within the meaning of Section 1111 (a) (2) of the Revenue Act of 1932, 26 U.S.C.A. Int. Rev. Acts, and, as such, was subject to income tax as a corporation.
>
> "It has been said that no inelastic rule can be advanced to settle the question, due to the variety of circumstances under which it may arise, but that the facts of each case, must control its determination. Morris-

sey v. Commissioner, 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263. * * *

* * * * * * * * * * *

"The determination of this issue depends upon whether the syndicate, so organized and operated, resembles a corporation more nearly than it does a partnership, not being either exactly. Commissioner v. Brouillard, 10 Cir., 70 F. (2d) 154; Bert v. Helvering, 67 App. D.C. 340, 92 F. (2d) 491. This is a question of fact, and the Board of Tax Appeals, under the stipulated facts, found that, for purposes of the income tax laws, the syndicate more nearly resembled a partnership. This finding must be upheld by this court if there is substantial evidence to support it, even though conflicting inferences fairly might be drawn by reasonable men from the undisputed facts. South Chicago Coal & Dock Co. v. Bassett, 60 S. Ct. 544, 84 L. Ed. —, Feb. 26, 1940.

* * * * * * * * * * *

"*From the undisputed facts above stated, a reasonable inference of fact may fairly be drawn that respondent was not an association within the meaning of the statute. Therefore, there is substantial evidence to support the finding of the board to this effect, and its conclusion of law that respondent was not subject to income tax as a corporation was correct.* Cf. Lucas, Commissioner v. Extension Oil Co., 5 Cir., 47 F. (2d) 65; Commissioner v. Brouillard, 10 Cir., 70 F. (2d) 154; Myers v. Commissioner, 7 Cir., 89 F. (2d) 86; Commissioner v. Gerstle, 9 Cir., 95 F. (2d) 587; Commissioner v. N. B. Whitcomb Coca Cola Syndicate, 5 Cir., 95 F. (2d) 596. See also Revenue Act of 1932, Section 1111 (a) (3), 47 Stat. 289, 26 U.S.C.A. Int. Rev. Acts." (Emphasis ours)

In *Del Mar Addition* v. *Commissioner*, 113 Fed. (2d) 410, the court said:

> "In cases involving the question of whether a business entity is, for taxation purposes, a corporation as defined by Section 801 (a) (2) of the Revenue Act of 1934, or a partnership under the definition of Section 801 (a) (3) thereof, and the entity does not conform to either definition entirely, the test applied is which of the two it more closely resembles. This is a question of fact, and the Board's finding thereon, if supported by evidence, must be upheld."

In this case the Board held (R-13):

> "Petitioner held, under the facts, to be a trust for purposes of income taxation and not an association taxable as a corporation."

As this finding is no doubt supported by some evidence and is not wholly unreasonable, the Circuit Court was without power to reverse this finding. The power of review of the Circuit Court upon appeals from the Board of Tax Appeals is fixed by Title 26, *U.S.C.A.*, Sec. 1141, Section 1 of Subsection (c) which reads:

> "(1) To affirm, modify, or reverse. Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for rehearing, as justice may require."

This section has been construed by this Court as limiting the review of a Circuit Court to matters of law and prohibiting a review by the Circuit Court of findings or conclusions of fact by the Board where supported by substantial evidence. See *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37, 40, 57 S. Ct. 324, 325:

> "* * * Accordingly it (the Circuit Court) reversed the Board and directed affirmance of the Commissioner's assessment.

"This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board. There was substantial evidence, as appears above, to support the latter's conclusion, and in such circumstances this must be accepted. It is the function of the Board to weigh the evidence and declare the result. We undertook to state the applicable rule in Helvering v. Rankin, 295 U. S. 123, 131, 55 S. Ct. 732, 736, 79 L. Ed. 1343, and General Utilities & Operating Company v. Helvering, 296 U. S. 200, 206, 56 S. Ct. 185, 187, 80 L. Ed. 154."

In *Palmer* v. *Commissioner of Internal Revenue*, 302 U. S. 63, 58 S. Ct. 67, the Court said:

"* * * But we cannot say that the Board here, in finding the value of the shares of the newly organized United as of the time of adoption of the first plan, did not consider the market prices of the rights. The findings are inferences which the Board was free to draw from all the facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court even if upon examination of the evidence it might draw a different inference. Helvering v. Rankin, 295 U. S. 123, 131, 132, 55 S. Ct. 732, 736, 79 L. Ed. 1343; Elmhurst Cemetery Co. v. Commissioner, 300 U. S. 37, 57 S. Ct. 324, 81 L. Ed. 491. * * *"

In *Helvering* v. *National Grocery Company*, 304 U. S. 282, 58 S. Ct. 932, the Court said:

"Fourth. The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon a trial de novo, in effect, an independent determination of the matters which had been in issue before the Board. The court was without power to do so. Helvering v. Rankin, 295 U. S. 123, 131, 132, 55 S. Ct. 732, 736, 79 L. Ed. 1343. *To draw inferences, to weigh the evidence and to de-*

clare the result was the function of the Board. Hulburd v. Commissioner, 296 U. S. 300, 306, 56 S. Ct. 197, 200, 80 L. Ed. 242; Elmhurst Cemetery Co. v. Commissioner, 300 U. S. 37, 40, 57 S. Ct. 324, 325, 81 L. Ed. 491." (Emphasis ours)

In *Helvering* v. *Kehoe,* 309 U. S. 277, 60 S. Ct. 549, the Court said:

> "Under the rule often announced, the function of the Board of Tax Appeals is to weigh the evidence and declare the result as to matters properly before it. Upon review the court may not substitute its judgment of the facts for that of the Board. When there is substantial evidence to support the conclusion of the latter this must be accepted. Helvering v. Rankin, 295 U. S. 123, 131, 55 S. Ct. 732, 736, 79 L. Ed. 1343; General Utilities & Operating Co. v. Helvering, 296 U. S. 200, 206, 56 S. Ct. 185, 187, 80 L. Ed. 154; Elmhurst Cemetery Co. v. Commissioner, 300 U. S. 37, 40, 57 S. Ct. 324, 325, 81 L. Ed. 491."

See also *Colorado National Bank* v. *Commissioner,* 305 U. S. 23, 59 S. Ct. 48, and *Helvering* v. *F. & R. Lazarus & Co.,* 308 U. S. 252, 60 S. Ct. 209.

The Board, having the witnesses before it and having heard *all* the evidence with its proper emphasis and not any synopsis or transcript thereof, held, on this evidence which, at most, permits conflicts of conclusions, that the taxpayer was a trust. This finding should have been sustained. The Tenth Circuit Court did not hold that the Board was not supported in its conclusion. It merely held:

> "Hence, we conclude the resemblance to a corporate organization was sufficient to *warrant* the Commissioner in treating the trust as an association."

The Circuit Court did not undertake to say that the evidence did not justify the Board's conclusion. We do not think it could have so said. But we feel that no decision of the Circuit Court can be supported which reverses the Board's decision unless it can and does say that the findings of the Board are not supported by the evidence.

II.

That the facts do not support the Circuit Court in its finding that the Petitioner was an association.

Not all trusts which handle money or hold property are to be held associations. See *A. A. Lewis & Co.* v. *Commissioner*, 301 U. S. 385, 57 S. Ct. 799.

In this case there is very little resemblance to either a corporate form or to a method of doing business which has been held to classify the parties as an association taxable as a corporation. If the label is to be torn from this entity on the theory that it is not in fact a trust, nevertheless it is not to be classified as an association if it more nearly resembles a partnership. We are firmly convinced that the resemblance to a partnership is much greater than the resemblance to an association.

Here partners in business acquired an oil and gas lease. No one else was taken in and the partners advanced their private capital for the development of that lease. As a matter of fact, they did not avail themselves of any immunity from liability, nor other benefits derived from an association. They were compelled to and did continue to administer all the affairs of the trust from their partnership office, the partners handling all such administrative matters.

In *Commissioner of Internal Revenue* v. *Gibbs-Preyer Trusts Nos. 1 & 2*, 117 Fed. (2d) 619, the court said:

> "Under the Revenue Acts of 1934 and 1935, a tax is imposed upon every corporation and the term 'corporation' is defined by statute to include associations (c. 277, 48 Stat. 680, 26 U.S.C.A., Int. Rev. Acts, page 790, c. 829, 49 Stat. 1014, 26 U.S.C.A., Int. Rev. Acts, page 811).
>
> "The term 'association' as used in these Acts embraces associations as they existed at common law and does not require organization under a statute or with statutory privileges. Whether a trust is an association taxable as a corporation must in the last analysis be determined by the facts peculiar to the case under consideration and in determining a taxable status, the court will take into consideration the purposes set out in the instrument creating the trust and the activities of the trustee and also of the cestuis que trustent.
>
> "It is not always controlling that one or more persons associate themselves together for the purpose of engaging in business for profit. If Congress had desired or intended to tax every association as a corporation it could have done so easily in simple and unmistakable language and if it had intended such an application of the statutes here in question, it would have so provided. It is persuasive that Congress intended to tax as a corporation only associations conducting their business for profit after the method and form of a corporation, with its economic advantages. The Congress has, in repeated enactments, extended over many years, provided for the taxation of trusts, partnerships and associations as separate taxable entities. It is clear it was the legislative intent to exclude one from the other and where the entity or enterprise in question which it is sought to tax as an association under the corporation statute, resembles a corporation in some respects and a pure trust in others, the fea-

tures of similarity should be compared and the marks of dissimilarity contrasted and the two balanced, and from this the true taxable entity determined.

* * * * * * * * * * *

"Not all of these features are present in the trusts involved. While title to the assets was in the trustee, and while the continuity of the enterprise might be affected through the transfer of a beneficial interest by reason of death, these are but the characteristics of a pure trust. There was, however, no limitation of liability of the cestuis que trustent and the trustee did not exercise a centralized management of the properties.

"We are of the opinion that the trusts were not associations, taxable as corporations on the ground that they were doing business as such. Lewis & Company v. Commissioner, 301 U. S. 385, 57 S. Ct. 799, 81 L. Ed. 1174."

See also *Commissioner* v. *Brouillard*, 70 Fed. (2d) 154, certiorari denied 293 U. S. 574, 55 S. Ct. 85; *Tyson* v. *Commissioner*, 54 Fed. (2d) 29; *Lucas, Commissioner* vs. *Extension Oil Co.*, 47 F. (2d) 65; *Commissioner of Internal Revenue* vs. *Duckwitz*, 68 F. (2d) 629; *Myers* vs. *Commissioner of Internal Revenue*, 89 F. (2d) 86; *Helvering* vs. *Washburn*, 99 F. (2d) 478.

In *Commissioner* v. *Rector & Davidson*, 111 Fed. (2d) 332, certiorari denied 311 U. S. 672, 61 S. Ct. 33, the Court said:

"The Revenue Act of 1932, Section 1111 (a) (2), defines a corporation to include associations, joint stock companies, and insurance companies, and paragraph (a) (3) of the section, 26 U.S.C.A. Int. Rev. Code, Sec. 3797 (a) (2), defines a partnership to include a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any

business, financial operation, or venture is carried on, and which is not a trust or estate or corporation. The Supreme Court recognized five salient features of a corporation in the case of Morrissey v. Commissioner, 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263. They are (1) title to the property held by the entity, (2) centralized management, (3) continuity uninterrupted by deaths among the beneficial owners, (4) transfer of interest without affecting the continuity of the enterprise, and (5) limitation of the personal liability of participants.

"In the case before us the title was held in undivided interests by all of the participants, and they were tenants in common of realty. Centralized management was obtained, not by shareholders' votes, but by the creation of an agency relation by each co-owner as principal, and without provision for continuity. There was no limitation of personal liability. No stock was issued, no meetings were held, and the enterprise had no office, no seal, no minutes, and no stock books; nor was any trust ever created. In these circumstances, the finding of the Board of Tax Appeals that respondent was a syndicate or joint venture which resembled a partnership more nearly than it did a corporation was a fair and reasonable conclusion, supported by the evidence, and its decision should be affirmed."

See also *Commissioner* v. *Horseshoe Lease Syndicate, supra*, 110 Fed. (2d) 748, certiorari denied 311 U. S. 666, 61 S. Ct. 24.

It is our opinion that the entity here involved had substantially all of the characteristics of a partnership, whereas it had very few of the characteristics of a corporation or an association. In Petitioner's Petition before the Board of Tax Appeals, it alleged (R-8):

"Predicated upon these facts, petitioner contends that the commissioner is in error in taxing the income of this trust as the income of an association taxable as a corporation; that the income is properly reportable, as reported by the petitioner, as the income of a trust estate; that if the petitioner is in error in this regard that the facts above enumerated indicate that the status of the parties is more nearly that of a partnership than of an association taxable as a corporation and the tax imposed by the commissioner is nevertheless error."

This contention has been preserved through the entire proceedings. It is now Petitioner's position that if the Circuit Court chooses to say that as a matter of law Petitioner cannot be a trust, unless the Circuit Court could and would say that Petitioner is, as a matter of law, necessarily classed as an association, that rather than reversing the Board of Tax Appeals, the Circuit Court should remand the cause to the Board of Tax Appeals for a determination by that Board of the fundamental issue of fact of whether or not Petitioner is an association taxable as a corporation or a partnership.

The Board found that Petitioner was a trust, as it was in form a trust and as it was primarily engaged in the liquidation of an estate previously owned by the parties, rather than an association organized for the purpose of entering into or engaging in business, and that Petitioner enjoyed very few of the advantages or characteristics of a corporation. If the Circuit Court says the Board of Tax Appeals, as a matter of law, erred in this conclusion, nevertheless the Circuit Court is not authorized to say, upon these facts, that Petitioner was an association taxable as a corporation. This, for the reason that the facts would sup-

port a conclusion that Petitioner was a partnership. As the Board of Tax Appeals is the fact-finding tribunal, it must be remanded to the Board for this determination.

Conclusion

In conclusion, Petitioner reasserts that its Petition for Writ of Certiorari ought to be granted.

Respectfully submitted,

GEORGE M. GREEN,
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Oklahoma City, Oklahoma,
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In the Supreme Court of the United States

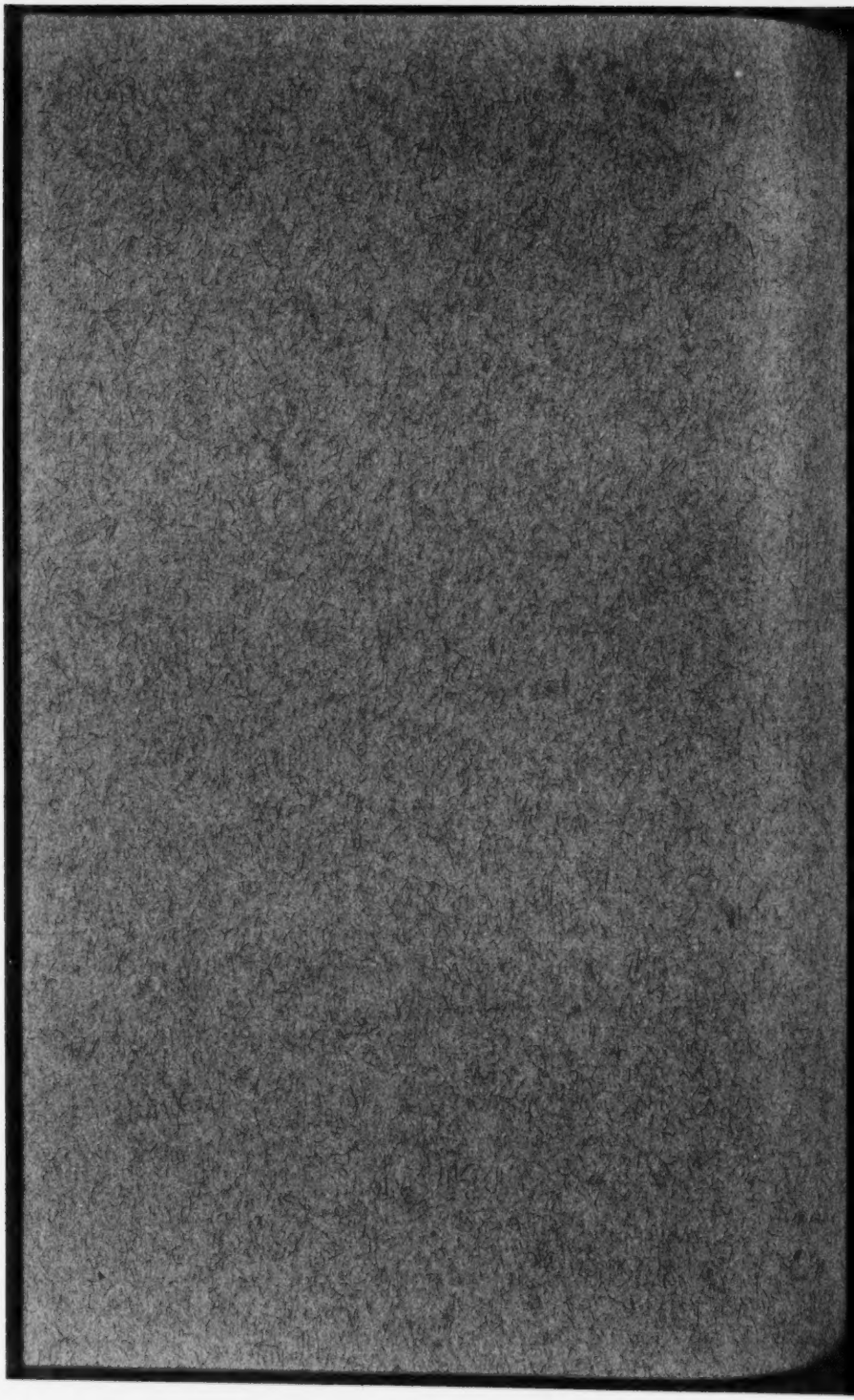
October Term, 1942

No. [illegible]

GUY T. [illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE [illegible]



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465151—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 88

NEBO OIL COMPANY, TRUST, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 13–20) was not reported. The opinion of the Circuit Court of Appeals (R. 72–77) is reported in 126 F. (2d) 148.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 18, 1942 (R. 77–78). A petition for rehearing (R. 81–86) was denied on March 24, 1942 (R. 87). The petition for a writ of certiorari was filed May 11, 1942. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Nebo Oil Company was an association taxable as a corporation within the meaning of Section 801 (a) (2) of the Revenue Act of 1934 and Section 1001 (a) (1) (2) of the Revenue Act of 1936.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 14–18) and the Circuit Court of Appeals (R. 72–76) may be summarized as follows:

In 1928, W. H. Clement, D. Replogle, and William G. Johnston acquired an oil and gas lease, known as the Nebo-Little lease. Each contributed one-third of the cost of the lease and acquired a one-third interest therein. Title was taken in the name of Clement, who held it as trustee for himself and his associates. From 1928 to 1932, Clement and his associates attempted without success to dispose of the lease. By 1932, because of adjacent offset developments, the lessor demanded development of the lease and threatened cancellation if drilling operations were not begun

immediately. In view of the threatened cancellation, a contract was entered into with a drilling company in 1932 (R. 14–15).

On December 12, 1932, while this well was in process of drilling and in anticipation of production, Clement executed a trust agreement conveying the lease to himself as trustee. The instrument declared Replogle, Johnston, and Clement to be the beneficiaries, each to the extent of a one-third interest. The trustee was given broad powers of management with full authority to operate the lease, to sell the oil and gas produced thereon, to collect the funds of the trust and distribute them among the beneficiaries, to begin and defend legal proceedings, to sign division orders, to convert any property of the trust and distribute or retain the proceeds, to invest the trust's funds, or trade or exchange the trust's properties, and to do all other things necessary for the (R. 15–16)—

> promotion of the welfare of this fiduciary trust estate, and the accomplishment of the purposes above stated, with as full discretionary power and authority vested in said trustee as he would have if he were the sole and absolute owner of said property in fee simple * * *.

In the event of the resignation or incapacity of the trustee, a new trustee was to be appointed by any two of the beneficiaries. The liability of the beneficiaries on account of any contract or tort

was to be limited to the funds and property of the trust. No beneficiary was to be "personally liable as a partner or principal or otherwise", on account of such contracts or torts. The interests of the beneficiaries were made transferable upon notice to the trustee, but no transfer of a partial interest was permissible. Transferees were to be bound by the terms of the trust and all acts performed thereunder (R. 15–16, 49–50, 73–74).

The trust was administered at the office used by the associates. It issued no trust certificates, had no officers or seal, and held no regular meetings. It had no employees other than those who worked on the leasehold. The trustee on his own responsibility dispatched all matters of routine business, but on questions of policy, such as the drilling of new wells, consulted with the other two beneficiaries. The original contribution of the beneficiaries to the trust in cash was $100. During the period from 1932 to 1934, Replogle and Clement made advances to the trust in cash and guaranteed contracts, bank loans, and trading accounts, in the amount of $90,000 (R. 16).

The first well was completed on December 15, 1932, and during the next 18 months three additional wells were drilled. No additional wells were drilled during the taxable years, 1934 to 1937, inclusive (R. 16, 18). On October 7, 1933, an oil and gas lease, known as the Odebrecht lease, was conveyed by Clement to the taxpayer. This conveyance was made at a time when it became neces-

sary to begin development of the lands covered by the lease (R. 17).

On November 10, 1933, at the request of the beneficiaries, Clement, as trustee, executed an instrument limiting his powers as trustee. It provided that the trustee would make an annual accounting to the beneficiaries; that he would not reinvest the trust funds except in the improvement, development and operation of the leasehold estate then owned by the trust; and that the cash surplus would be annually distributed to the beneficiaries, except that the trustee should retain such sum as he should deem to be reasonably necessary for future expenditures on the lease property, for maturing obligations, and as a prudent surplus against unforseen injury to the lease (R. 17, 54–55, 74).

On February 14, 1935, the trust instrument of December 12, 1932, was further modified by a written instrument. It provided that the trustee should furnish quarterly statements of income and disbursements to each beneficiary, and, after payment of operating expenses and indebtedness, should disburse the net profits quarterly to the beneficiaries; that the trustee should not have power to purchase real property or other leaseholds, but that he should not be restricted in purchasing supplies and equipment necessary to operate the trust property; that he should not have the power to sell or mortgage any part of

the trust leaseholds; and that he should not have the power to drill additional wells on those properties (R. 17, 56–57, 74–75).

The Nebo-Little and Odebrecht leases were the only leases acquired by the taxpayer. It owned no other properties. The funds received by it from oil production were either applied to the costs of further development of the leases or were distributed to the beneficiaries. During the taxable years 1934 to 1937, inclusive, there was no transfer of the interests of the beneficiaries nor any attempt to sell beneficial interests. The taxpayer during each of the taxable years realized net income from oil production which was distributed to the beneficiaries (R. 17–18).

The taxpayer reported its income for the taxable years as a fiduciary, showing distribution thereof to the beneficiaries, who returned the distributions in their taxable income. The taxpayer filed capital stock tax returns and paid taxes thereon for the years 1934 to 1937, inclusive. Suit for refund of these taxes was pending at the time of the hearing before the Board (R. 18).

The Commissioner determined that the taxpayer was an association taxable as a corporation and proposed deficiencies accordingly (R. 9–10, 13). The Board of Tax Appeals held that the taxpayer was a trust and not taxable as a corporation (R. 18–20). The Circuit Court of Appeals reversed (R. 77).

ARGUMENT

The court below correctly ruled that the petitioner was taxable as an association rather than as a pure trust. The decision is in accord with the decisions of this Court, and there is no occasion for further review.

The taxpayer had those features which ordinarily characterize an association: centralized management of a business enterprise; continuity of the enterprise for the benefit of the equity owners, which was free from termination or interruption through the death of either a beneficial owner or the trustee; transferability of the equity interests, without affecting the continuity of the enterprise; and limitation of personal liability. *Morrissey* v. *Commissioner,* 296 U. S. 344; *Swanson* v. *Commissioner,* 296 U. S. 362; *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369; *Helvering* v. *Combs,* 296 U. S. 365.

The taxpayer's principal contention is that the court below was without power to review the Board's conclusion that the taxpayer was a pure trust. But there is no disputed question of fact in this case, the sole issue being whether the taxpayer was an association as a matter of law. The court below had full power to consider that question, and, indeed, this Court reversed both the Board and a circuit court of appeals in *Helvering* v. *Combs,* 296 U. S. 365, on just such an issue. The *Combs* decision is therefore conclusive that the

question is not one of fact and is open to reexamination by an appellate court.

The Board's decision in this case rested largely upon the supposed purpose in creating the trust as one to define the rights of the parties, with the corollary that the trustee was merely a disbursement and collection agent. But that conclusion was tantamount to a holding that the motive for uniting to form an entity possessing corporate attributes may prevent the entity from being an association—a holding that was directly contrary to *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369, 373–374. Thus, even though the question whether a particular organization is an association may not normally be reviewable upon appeal, it was reviewable here because the Board had not applied the correct legal principles in reaching its conclusion. Cf. *Powers* v. *Commissioner,* 312 U. S. 259.

The Board also relied on the fact that the beneficial owners advanced sums to the trust and pledged their individual credit for it (R. 20). Such voluntary action is hardly an indicium that an association was not created. Cf. *Commissioner* v. *Fortney Oil Co.,* 125 F. (2d) 995 (C. C. A. 6th); *Kilgallon* v. *Commissioner,* 96 F. (2d) 337 (C. C. A. 7th), certiorari denied, 305 U. S. 622. And the absence of such characteristics of corporate form as certificates of interest, appointment of officers and hiring of employees, relied on by the Board (R. 20), is also not controlling. *Morrissey* v.

Commissioner, supra; Swanson v. *Commissioner, supra; Helvering* v. *Coleman-Gilbert, supra; Commissioner* v. *Fortney Oil Co., supra.*

Point II of the taxpayer's brief in support of its petition (pp. 17–22) consists largely of the contention that the resemblance to a partnership is much greater here than the resemblance to an association. The taxpayer contends that denial of its status as an ordinary trust should be followed by a remand to the Board for findings on the partnership status. However, if the taxpayer is not a pure trust, there is even less room for a determination that it is a partnership. The provisions for continuity and limited liability deprive the entity of the two most significant indicia of a partnership.

CONCLUSION

The decision below is in accord with applicable decisions of this Court. It is respectfully submitted that the petition should be denied.

CHARLES FAHY,
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Special Assistants to the Attorney General.

JUNE 1942.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 801. DEFINITIONS.
>
> (a) When used in this Act—
>
> (1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.
>
> (2) The term "corporation" includes associations, joint-stock companies, and insurance companies.
>
> * * * * *

(Subsections (a) (1) and (2) of Section 1001 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, are identical with those quoted above.)

As to section 801 (a) (1) and (2) of the 1934 Act:

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> ART. 801–1. *Classification of taxables.*— For the purpose of taxation the Act makes its own classifications and prescribes its own standards of classification. Local law is of no importance in this connection. Thus a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. * * * The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships.
>
> * * * * *

ART. 801–2. *Association.*—The term "association" is not used in the Act in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise.

* * * * *

ART. 801–3. *Association distinguished from trust.*—The term "trust," as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with

a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode

of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer," the use of a "seal," the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws," the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The dis-

> tinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

As to Section 1001 (a) (1) and (2) of the 1936 Act:

Articles 1001–1 and 1001–2 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, are substantially the same as Articles 801–1 and 801–2 of Treasury Regulations 86.

Article 1001–3 of Treasury Regulations 94 is substantially the same as Article 801–3 of Regulations 86, except that the following has been added to paragraphs 2 and 3, respectively, of the former:

> Paragraph 2:
> * * * The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.
>
> Paragraph 3:
> * * * However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

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NO. 1231 88

In the Supreme Court of the United States

OCTOBER TERM, 1941

NEBO OIL COMPANY, a Trust, by W. H. Clement, Trustee,
Petitioner,

VERSUS

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

T. MURRAY ROBINSON,
Attorney for Petitioner.

August, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

NO. 1231

In the Supreme Court of the United States

OCTOBER TERM, 1941

NEBO OIL COMPANY, a Trust, by W. H. Clement, Trustee,
Petitioner,

VERSUS

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

We submit for consideration the following language in the case of *Wilmington Trust Company* v. *Helvering*, decided April 27, 1942, reported 62 Supreme Court Reporter, page 984. Therein this Court said:

> "The true character of the 'short' account is a question of fact to be determined in the light of the outward or manifested intention of the taxpayer and the way in which the account was actually managed. The designation of the accounts, the fact that as a matter of bookkeeping sales made through the 'short' account apparently were not reflected in the 'long' accounts, the method of reporting gains or losses are some evidence to support the conclusion of the court below. But there are numerous other circumstances which look the other way. They are embraced in the several subsidiary findings which the Board made and which we have enumerated. Those findings are supported by substantial evidence and are abundant justification for the Board's ultimate finding that the sales made through

> the 'short' account were ordinary sales. It is the function of the Board, not the Circuit Court of Appeals, to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences. The court may not substitute its view of the facts for that of the Board. Where the findings of the Board are supported by substantial evidence they are conclusive. *Helvering* v. *F. & R. Lazarus & Co., supra; Helvering* v. *Kehoe*, 309 U. S. 277, 60 S. Ct. 549, 84 L. ed. 751, and cases cited. Under the statute the court may modify or reverse the decision of the Board only if it is 'not in accordance with law." 44 Stat. 110, Sec. 1003(b), 26 U. S. C. Int. Rev. Code, Sec. 1141(c) (1), 26 U. S. C. A. Int. Rev. Code, Sec. 1141(c) (1)."

Applicability of that language to the petition for writ of certiorari herein sought is quite apparent. The board, giving greater weight to some portions of the evidence, decided that taxpayer was a trust. The Circuit Court, giving greater weight to other portions of the evidence, decided that taxpayer was an association taxable as a corporation. This the Court could not do.

Respectfully submitted,

T. MURRAY ROBINSON,
Attorney for Petitioner.

August, 1942.

⊙